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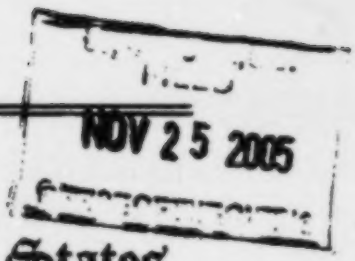

In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the mere flow of the Presumpscot River through Warren's existing dams constitute a "discharge into" the Presumpscot River under section 401 of the Clean Water Act?

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Maine Supreme Judicial Court (the "SJC") were Petitioner S.D. Warren Company ("Warren"), Respondent Maine Department of Environmental Protection (the "DEP"), and Intervenors (now Respondents according to Supreme Court Rule 12.6) American Rivers and Friends of the Presumpscot River.

Warren's petition for a writ of certiorari (the "Petition") contains Warren's corporate disclosure statement. Petition at ii.

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OPINIONS AND ORDERS BELOW

The two unreported orders of Maine's DEP are reprinted in the Petition Appendix ("Pet. App."); the DEP Commissioner's initial certification order (the "Certification") is at Pet. App. A-74; and the Maine Board of Environmental Protection's order on appeal of the Certification is at Pet. App. A-35. The unreported Maine Superior Court's order, *S.D. Warren Co. v. Maine Department of Environmental Protection*, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004), is reprinted in the Petition Appendix at A-19. The opinion of Maine's Supreme Judicial Court, sitting as the "Law Court," entered February 15, 2005, is reported at *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, and is reprinted in the Petition Appendix at A-1.

JURISDICTION

The SJC exercised jurisdiction over Warren's appeal pursuant to ME. REV. STAT. ANN. tit. 5, §§ 11001(1) and 11008(1) in order to decide, among other things, whether and to what extent the State of Maine was entitled to issue a certification affecting Warren's dams under 33 U.S.C. § 1341. The opinion of the SJC was entered on February 15, 2005. Warren filed the Petition on May 12, 2005; on October 11, 2005, this Court granted certiorari. This Court's jurisdiction rests upon 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

At issue in this case is the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (the "Clean Water

Act"), in particular section 401, 33 U.S.C. § 1341, and pertinent statutory definitions contained in section 502(12) and (16), 33 U.S.C. § 1362(12) and (16).

Directly at issue is the first sentence of section 401(a)(1), which states as follows:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1).[1] The complete text of section 401 is reprinted in the Appendix to this brief.

Also at issue are the definitions contained in section 502(12) and (16), which state as follows:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to the navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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[1] "Navigable waters" are defined as the "waters of the United States" at section 502(7), 33 U.S.C. § 1362(7).

> The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

Id. § 1362(12) and (16).

Finally, also involved are Clean Water Act sections 304(f)(2)(F), 402, 502(7) and 511(c)(2), 33 U.S.C. §§ 1314(f)(2)(F), 1342, 1362(7) and 1371(c)(2), copies of all of which are provided in the Appendix to this brief.

STATEMENT OF THE CASE

I. Background

Warren owns and operates five hydroelectric generating dams on the Presumpscot River in Maine. Pet. App. A-2, A-19. All five of the dams were constructed in the early 1900s. Pet. App. A-2. These dams provide electricity to Warren's Westbrook paper mill. Pet. App. A-1. They previously generated approximately 40,500,000 kilowatt-hours of electricity annually, which is roughly the equivalent of 67,500 barrels of oil. Pet. App. A-118.

The dams are operated in run-of-river mode, meaning that the outflow of the projects is "approximately equal to inflow on an instantaneous basis. . . ." Pet. App. A-77. In the words of the SJC, "Warren is not adding more water to the river." A-8. Although they are not identical, all of Warren's dams operate in a generally similar fashion. *See* Joint Appendix ("J.A.") 11, 13-15, 17 (depicting each of Warren's hydropower projects). To generate power, water is channeled into the "power canal," past the turbines, and then back into the riverbed through the "tailrace channel." The water flowing through the power canal bypasses a

short section of the riverbed immediately below the dam. This section of the riverbed is the "bypass reach"; each of Warren's projects has such a bypass reach. Pet. App. A-75 to A-77. These bypass reaches receive the water not routed past the turbines. Pet. App. A-78.

Above each dam is an impoundment, a portion of the river through which the flow of water is slowed by the dam. Warren continually operates its dams, maintaining in each impoundment a relatively consistent water level that fluctuates no more than one foot under normal operating conditions.[2] Pet. App. A-78.

All parties agree that Warren's run-of-river dams do not add any pollutants to the Presumpscot River. In the DEP's words, "[n]one of the dams add 'pollutants' as that term is defined in section 502(6) of the Clean Water Act." DEP's Brief In Opposition To Petition For Certiorari at 3; *see also id. at* 9 n.6 (stating the "proposition that the dams in question do not discharge 'pollutants' [is] a proposition that [was] never contested in this case"). The dams nevertheless do affect the movement and flow of the Presumpscot River, in several instances causing less dissolved oxygen to be retained in the water, Petition Appendix A-51, and impacting habitat for aquatic organisms by limiting the flow of water in the bypass reach. Pet. App. A-78, A-89. The dams also change the nature of the river's recreational uses. *See, e.g.*, Pet. App. A-88 to A-89 (noting the impact of the dams on the river's fishery).

To operate the dams, Warren is required to obtain licenses from the Federal Energy Regulatory Commission

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[2] Hereinafter, Warren's hydropower projects, described in the paragraphs above, are referred to as Warren's dams.

("FERC"). 16 U.S.C. § 817. Warren previously obtained licenses for the five dams between 1979 and 1981. On each such occasion, the issue posed in this case did not arise because the State of Maine did not seek to issue a section 401 certification for these run-of-river dams. FERC Orders, 9 FERC ¶ 62,063 (Oct. 31, 1979); 11 FERC ¶ 62,111 (May 14, 1980); 11 FERC ¶ 62,150 (May 28, 1980); 12 FERC ¶ 62,285 (Sept. 30, 1980); 16 FERC ¶ 62,458 (Sept. 17, 1981) (licensing respectively: Saccarappa Project No. 2897, Mallison Falls Project No. 2932, Little Falls Project No. 2941, Gambo Project No. 2931, and Dundee Project No. 2942). Those licenses expired on January 26, 2001. Warren filed its application for relicensing with FERC on January 22, 1999.

FERC's authority to issue such licenses is found in section 4(e) of the Federal Power Act ("FPA"). 16 U.S.C. § 797(e). That section provides:

> The Commission is authorized and empowered –
>
> . . . .
>
> To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States,

> or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam. . . . In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purpose of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Id.

The goal of section 4 "is to assure a true multiple use of water resources." H.R. CONF. REP. NO. 99-934, at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2537, 2538. To this end, the law instructs FERC, as part of the licensing process, to consider "the applicant's plans for the improvement and broad, efficient and reliable utilization of the power potential of the waterway or waterways to which the project is related, together with other beneficial uses, including navigation, flood control, irrigation, recreation, water quality, and fish and wildlife. . . ." H.R. REP. NO. 99-507, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2521.

Section 10(a) of the FPA further provides that licenses issued by FERC must be subject to the condition:

> That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or

> benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a)(1).

Section 18 of the FPA, 16 U.S.C. § 811, provides additional protection for fish. This section establishes that FERC "shall require the construction, maintenance, and operation by a licensee . . . of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." *Id.* § 811.

Finally, section 10(j) allows for broad input regarding environmental protection by requiring FERC to consider the recommendations furnished by federal and state environmental agencies regarding a project's impacts on fish and wildlife. *Id.* § 803(j). By requiring FERC to consider but not be bound by the input of environmental agencies, Congress "intended to stress the expertise of these agencies and the need for FERC to rely on them . . . without giving such agencies a veto or giving them mandatory authority such as provided in section 30(c) of the Act."

H.R. REP. No. 99-507, at 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3496, 2519.[3]

FERC's ability to balance the nation's energy needs and environmental considerations is subject to a major limitation imposed by the Clean Water Act. If the activity that FERC proposes to license may involve any discharge into the navigable waters, FERC may not grant a license unless the license applicant first obtains a certification or waiver from the state in which the discharge originates. 33 U.S.C. § 1341. The state that issues such a certification need not take into consideration the nation's energy needs

---

[3] Section 27 of the FPA establishes the role of states in the licensing process. 16 U.S.C. § 821. This section provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein.

Id.

Focusing largely on the language in sections 4(e) and 27 prior to the 1986 FPA amendments, the Court in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), noted that the Federal Power Commission (the predecessor to FERC), save for the specific exceptions carved out in the FPA, is solely responsible for the licensing of hydropower projects. *Id.* at 168, 182. *First Iowa* then established that, in general, under the FPA the authority of the federal government supersedes that of state governments. *Id.* at 168. Section 27 saves some authority for the states, but the effect of that section "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in *irrigation* or for *municipal* or *other uses of the same nature*." *Id.* at 175-76 (emphasis added).

Subsequent to the 1986 amendments, in *California v. FERC*, 495 U.S. 490 (1990), the Court reaffirmed its holding in *First Iowa* that the FPA grants FERC exclusive jurisdiction over hydropower project licensing.

and goals. *See id.* (identifying the scope of a state's certification authority and requiring evaluation only of environmental issues).

II. Maine Agency Action

FERC's rules and regulations require that "with regard to certification requirements for a license applicant under section 401(a)(1)," an applicant must file a copy of the water quality certification, a request for such certification, or evidence of waiver of such certification. 18 C.F.R. § 4.34(b)(5)(i). Warren filed a request for certification with Maine's DEP, and simultaneously took the position that the dams cause no discharge into the river within the meaning of section 401. The initial agency certification process lasted over four years. During the process, there was no suggestion that the dams add anything to the river. *See* Pet. App. A-87 to A-88, A-106 to A-110, A-120 to A-121.

The DEP Commissioner nevertheless issued a Certification imposing extensive restrictions on the operation of the facilities, resulting in a projected loss of energy equivalent to roughly one-seventh of the dams' electric generation (10,000 barrels of oil per year). Pet. App. A-118 to A-120. The restrictions included, among other things, conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, reaeration measures, and recreational facilities. Pet. App. A-121 to A-140 (containing the conditions of the Certification).

Warren appealed to Maine's Board of Environmental Protection. Warren argued, among other things, that the Certification was not warranted by section 401 because

the dams do not result in any discharge into the river. *See* Pet. App. A-118 to A-120 (comparing pre- and post-Certification power generation); Pet. App. A-38 to A-39 (reciting Warren's basis for its appeal).

The Board of Environmental Protection affirmed after *de novo* review. Pet. App. A-37 to A-38, A-73.

III. Maine Judicial Review

Warren then timely filed a petition for review in the Maine Superior Court. Warren argued, *inter alia*, that a river flowing through a dam does not in and of itself constitute a "discharge into" the river that triggers section 401 certification requirements. The Superior Court denied Warren's appeal. Pet. App. A-34.

Warren appealed to the SJC, which issued its decision denying Warren's appeal on February 15, 2005. The SJC, addressing the issue of whether water flowing through a dam constitutes a "discharge" under section 401, created an entirely new legal test and concluded that, based on that test, all water passing through a dam qualifies as a discharge. Pet. App. A-7 to A-8.

The SJC began its analysis by looking to the statutory language. The SJC stated:

> The term discharge is not expressly defined anywhere in the [Clean Water Act], however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress."

Pet. App. A-6 (citing *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997)). The statute defines the phrases "discharge of a pollutant" and "discharge of pollutants" as follows:

> (A) any *addition* of any pollutant to navigable waters from any point source,
>
> (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (emphasis added). The SJC thus correctly reasoned that "[a]n 'addition' is the fundamental characteristic of any discharge." Pet. App. A-6.

In assessing whether water flowing through a dam constitutes an "addition" the SJC focused on whether the water is subject to "private control." Pet. App. A-7 to A-8. The SJC reasoned that the moment water passes through a dam it is subject to "private control" and thus temporarily loses its status as waters of the United States. Pet. App. A-7 to A-8. The "exiting" from the dam of this water that is presumed to have momentarily ceased being waters of the United States, reasoned the SJC, thus constituted an "addition" of non-U.S. waters to waters of the United States. Pet. App. A-8, A-10. Such an "addition," the SJC concluded, is a "discharge into" the river requiring water quality certification pursuant to section 401. Pet. App. A-7 to A-8.

SUMMARY OF THE ARGUMENT

Warren's argument begins with the language of the statute. Under section 401, certification is required only when an activity "may result in any discharge into navigable waters." Section 502(12) and (16), in turn, equate a "discharge" with "an addition . . . from a point source." On the facts of this case, the question framed by this language is whether a river flowing through a dam is an addition to the river from a point source.

The SJC erred in answering this question. The waters do not cease being navigable waters as they flow through the dams; and, in any event, any momentary change in the legal characterization of the river as it flows through the dam is not an addition of anything to the river.

This Court's recent decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), supports Warren's position. The Court in that case adopted the straightforward reasoning that polluted waters flowing into a reservoir from a canal add nothing to the navigable waters if the reservoir and canal are not meaningfully distinct water bodies. So, too, Warren's dams add nothing to the Presumpscot River. In the words of the U.S. Environmental Protection Agency ("EPA"), "no 'addition'" occurs merely as the result of "movement of water through a dam." Memorandum from Ann R. Klee, EPA General Counsel, and Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," at 18 n.18 (Aug. 5, 2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf.

Section 304(f)(2)(F) further reinforces the conclusion that Warren's dams cannot be described as resulting in a discharge into the Presumpscot River within the meaning of section 401. In section 304(f)(2)(F) Congress addressed the effects that even clean, run-of-river dams might have on water quality. In so doing, Congress employed entirely different terminology than that used in section 401, expressly recognizing that such potential water quality effects result not from discharges into the river, but rather from changes in the movement and flow of the water.

Expanding the analysis to consider both the Clean Water Act as a whole, and Congress's efforts in drafting sections 401 and 402 in particular, strongly suggests that the foregoing conclusions are modest and likely understated. Section 511(c)(2) precludes redundant or inconsistent review under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), of activities certified under section 401. The language Congress used in section 511(c)(2) to accomplish this result strongly suggests that Congress presumed that all section 401 certifications involved not only an addition to the water, but an addition of a pollutant. Congress's efforts in drafting sections 401 and 402 evidence the same presumption. To rule in favor of Warren, the Court nevertheless need not conclude that section 401 must be read as narrowly as context and history suggest. The point, instead, is that context and history provide no mandate for even trying to interpret the plain language more broadly than it appears, and certainly not so broadly as to make it apply to any and all activities that merely touch upon the navigable waters.

For all of these reasons, as more fully explained below, the flow of the Presumpscot River through Warren's dams does not constitute a discharge into the Presumpscot

River, and the SJC therefore erred in ruling that section 401 granted to the State of Maine the authority to issue the Certification.

ARGUMENT

THE MERE FLOW OF THE PRESUMPSCOT RIVER THROUGH WARREN'S EXISTING DAMS DOES NOT CONSTITUTE A DISCHARGE INTO THE PRESUMPSCOT RIVER UNDER SECTION 401 OF THE CLEAN WATER ACT.

I. The Plain Language Of The Statute Makes Clear That The Phrase "Discharge Into" Means An Addition From A Point Source Of Something To The Presumpscot River Other Than The Presumpscot River Itself.

In determining the scope of section 401, the starting point necessarily is the language of the statute itself. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). As explained below, the plain language of the statute, including the interlocking definitions supplied by Congress, makes clear that a "discharge into" the navigable waters under section 401 requires, at a minimum, the addition into the water from a point source of something other than the water itself.

A. There Can Be No "Discharge" Under Section 401 When There Is No Addition To The River From A Point Source.

Congress defined in section 502(16) the bare word "discharge." Section 502(16) states that the word "'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Such a definition, by itself, is partially tautological, with the defined word "discharge" appearing on both sides of the verb "includes." In section 502(12), however, Congress further specified that the term "discharge of pollutants" means "any addition of any pollutant to the navigable waters from any point source." This definition makes clear, at least as a matter of plain language and logic, that Congress equated the notion of a "discharge" with the notion of "any addition . . . from any point source." In the words of the D.C. Circuit, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition . . . of a substance or substances." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997); *see also id.* n.4 (noting that "if 'discharge of a pollutant' requires addition, then the inclusive understanding of 'discharge' also requires an addition").

This Congressional intent to equate "discharge" with "addition . . . from a point source" is further confirmed by the language of section 401 itself. The first sentence of section 401 apportions responsibility for certification among interstate water pollution control agencies based on which agency has "jurisdiction over the navigable waters at the point where the discharge originates or will originate. . . ." This language confirms that the "discharges" envisioned in section 401 were discharges from

point sources into the waters. In other words, the "from a point source" portion of the section 502(12) definition clearly carries over into section 401. There being nothing in the language to suggest otherwise, the "addition" portion therefore clearly carries over as well, so that a section 401 discharge is an "addition . . . from any point source."

B. The Flow Of The Presumpscot River Through Warren's Dams Is Not An "Addition" To The Presumpscot River.

The SJC did not disagree with any of the foregoing argument. To the contrary, the SJC expressly agreed that "[a]n addition is the fundamental characteristic of any discharge." Pet. App. 6. That agreement should have led to a ruling that Warren's dams cause no discharge at all because they add nothing to the Presumpscot River. Instead, the SJC opined, first, that the dams turn the river into non-U.S. waters, and then that the dams "add" those waters back to the river. The SJC then reasoned that, by using the word "includes" rather than "means," Congress did not intend to limit to pollutants the universe of what it is that need be added to the water to trigger section 401. Pet. App. A-9 to A-10. Therefore, adding "non-U.S. waters" to the "U.S. waters" was a "discharge into" the U.S. waters. This reasoning is thrice flawed.

First, as a matter of statutory construction, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *see Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (discussing the "interpretive rule as familiar outside the law as it is within, for words and people are known by their companions"). By defining "discharge" as including a "discharge of a pollutant, and a discharge of pollutants," which in turn are defined as "any addition of any

pollutant," Congress associated a "discharge" with an "addition" into the water of a pollutant or at least something similar to a pollutant. The mere fact that the definition of "discharge" says that it "includes" a "discharge of a pollutant," instead of saying that it "means" a "discharge of a pollutant," does not give free rein to conclude that a "discharge" is the addition of anything at all, much less the water itself. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (holding that language following the term "including" in a statutory provision "is meant simply to be illustrative, hence redundant" of the scope of the statute's reach); *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 189 (1941) (holding that language following the phrase "including" in a statutory provision is intended to serve as an "illustrative application" of the statute's scope).

Second, section 401 uses not merely the word "discharge," but rather the term "discharge into." It stretches credulity to contend that Congress somehow envisioned a river flowing through a dam as a river "discharging into" itself. That the SJC's reading of the statute would compel such a contrived result means that its interpretation should be rejected. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) (noting "the common mandate of statutory construction to avoid absurd results"); *Taylor v. United States*, 495 U.S. 575, 596 (1990) (rejecting party's "implausible interpretation of a statute").

Third, the SJC's conclusory statement that the Presumpscot River ceased being navigable waters, and thus no longer waters of the United States as it flowed through the dam, is simply wrong. The only support cited by the SJC for this statement is the 1996 First Circuit decision in *Dubois v. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). Pet. App. A-7 to A-8. *Dubois* held, among other things, that

a particular river and a particular pond were distinct water bodies, and that pumping polluted water uphill from the river to the pond through pipes was the discharge of a pollutant into the pond. 102 F.3d at 1299. The *Dubois* court further stated (without any cited authority) that when the river water was removed and piped uphill, it lost its status as waters of the United States. *Id.* at 1297-98.

Correct or not, the *Dubois* holdings cannot be relied on to imply that a dam or a pumping station on the same body of water could be said to be adding or discharging anything into the water merely by controlling the water. To the contrary, the *Dubois* court expressly distinguished the facilities before it from "a dam that merely accumulates the same water . . . or a pump storage facility that stores water from one source in a different place." *Id.* at 1299 (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589-90 (6th Cir. 1988)). The *Consumers Power* decision cited by the First Circuit in *Dubois* expressly held that water flowing through a pump storage, hydroelectric generation facility "never loses its status as water of the United States." *Consumers Power*, 862 F.2d at 589. The Sixth Circuit stated in *Consumers Power*: "[t]o the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act." *Id.* at 586.

In short, the SJC took an unnecessary and unsupported dictum from *Dubois*, and then applied it to the very situation that *Dubois* distinguished, in direct conflict with one of the cases on which *Dubois* relied as demonstrating a situation in which no "addition" occurred. In so doing, the SJC calls into question the reach of federal authority over the nation's waters. If the exercise of momentary control

over navigable waters caused the waters to cease being waters of the United States, stretches of water canals and controlled waterways throughout the country would lose their status as waters of the United States. That status is the lynchpin for the exercise of Congressional authority over those waters under the Commerce Clause. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (noting that this Court has used the term navigable waters "in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause").

The SJC's view is also inconsistent with this Court's analysis in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In that case the Court reaffirmed that the actual navigability of a water at every given moment is not determinative of whether a water qualifies as "navigable waters." *Id.* at 171-72. "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Applying this reasoning, if a river is a navigable water in the absence of a dam, it does not lose its status as such as it momentarily flows through a dam.

Finally, the SJC's view ignores the fact that Warren's "control" of the river is not an assertion of ownership in even the simplest sense. Warren routes the river water through its dams pursuant to the express permission of the United States, as manifest in the FERC license granting such permission. There is nothing in that license suggesting that the waters somehow lose their status as waters of the United States. The SJC's conclusion to the contrary is simply a fictional construct that has no purpose

or significance other than serving as a basis for squeezing into the language of section 401 certain conduct that, on its face, is not encompassed by that language.

II. *Miccosukee* Supports The Conclusion That The Mere Flow Of A River Through A Dam Is Not A Discharge Of Anything Into The River.

The conclusions that a discharge into the river requires an addition of something to the river, and that temporarily controlling and uncontrolling the river is not an addition to the river, are directly supported by last year's decision in *Miccosukee*. *Miccosukee* concerned "a pumping facility that transfers water from a canal into a reservoir a short distance away." 541 U.S. at 98-99. The issue was whether "the pumping facility is required to obtain a discharge permit under" section 402 of the Clean Water Act. *Id.* at 99. Absent certain exceptions, the Clean Water Act requires such a discharge permit under section 402 for any facility that causes "the discharge of any pollutant." 33 U.S.C. § 1311(a). As noted above, the Clean Water Act defines "the discharge of any pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

The Court held that the pumping facility was a point source. *Miccosukee*, 541 U.S. at 105. There was no dispute that "phosphorous-laden water" flowed through that point source from the canal into the reservoir. *Id.* at 102. And it was clear that the owner of the pump exercised control over the water (by pumping it from the canal to the reservoir).

The Court nevertheless held that those facts were insufficient to establish that the facility pumping polluted

waters into the reservoir from the canal was causing a discharge into the navigable waters. Focusing on the definitional requirement that there must be "an addition" of pollutants to the navigable waters for there to be a "discharge" of pollutants, the Court concluded that the question whether a permit was required turned on whether the waters in the canal and the waters in the reservoir were "not meaningfully distinct water bodies." *Id.* at 112. Quoting the Second Circuit, the Court noted that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

Miccosukee thus holds that merely taking control over water in a man-made facility to cause it to travel from one point to another is not an addition of anything to the water if the water at the entrance and the exit of the facility are not meaningfully distinct water bodies. *A fortiori*, causing the Presumpscot River to continue on its way to the ocean through a dam, turning a turbine as it passes, is not an activity that adds anything to the Presumpscot River. Just as the term "discharge" under section 402 requires an addition of something into the water to qualify as a discharge at all, so too is an addition required for there to be a discharge under section 401. *See, e.g.*, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (holding that courts should avoid interpreting a statutory provision "in such a way as to give the familiar statutory language a meaning foreign to every other context in which it is used"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573 (1995) ("[W]e cannot accept the conclusion that this single operative word means one thing in one

section of the Act and something quite different in another.").[4]

III. The EPA Has Opined That No "Addition" Occurs As A Result Of Water Passing Through A Dam.

In the wake of *Miccosukee*, the EPA on August 5, 2005 issued a formal interpretation addressing the applicability of section 402 of the Clean Water Act to water transfers. Memorandum from Ann R. Klee, EPA General Counsel, and Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, regarding "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (Aug. 5, 2005) ("EPA Interp."), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The interpretation concluded that the permit requirements of section 402 are "generally inapplicable" to water transfers, or to dams that do not add pollutants to the water flowing through the dams. *Id.* at 9. With regard to dams, the EPA noted in particular that "the movement of water through a dam" does not require a permit both because it does not transfer water between two water bodies, *and* also "because no 'addition' has occurred." *Id.* at 18 n.18. As discussed above, the requirement that there be "an addition" is common to both section 402 and section 401.

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[4] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994), is not to the contrary. In that case, the Court simply observed that the proposed builder of a new dam conceded that the new dam would involve at least two possible discharges, including "the discharge of water at the end of the tailrace." The case did not present the issue of whether such a "discharge" is a discharge into the waters under section 401.

The EPA's conclusion regarding dams did not rest on the absence of pollutants going through dams. To the contrary, like the Court in *Miccosukee*, the EPA presumed the water flowing in and out of the dam to be polluted. Instead it focused on the fact that, polluted or not, the water was not added to the river by the dam. The EPA further cited with approval the opinion of the Sixth Circuit in *Consumers Power* and the D.C. Circuit's opinion in *Gorsuch* that "generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution." *Id.* at 12 (quoting *Consumers Power*, 862 F.2d at 588) and 13 (characterizing the reasoning in *Gorsuch* and *Consumers Power* as reflective of the "better approach" for determining what constitutes an "addition"). The EPA was correct in finding that the flow of water through a dam involves no addition to the waters.

IV. Clean Water Act Section 304(f)(2)(F) Evidences That Congress Used Terms And Concepts Other Than "Discharge" To Describe The Mechanism Whereby Dams Can Affect Water Quality.

None of the foregoing is intended to deny that the operation of a dam affects a river. Depending on its operation, a dam can cause changes in the movement, flow, and circulation of a river. Such changes can cause a river to absorb less oxygen and to be less passable by boaters and fish. A dammed river, by definition, is not a wild river, and the Presumpscot River is not the same river it was before dams were added 250 years ago. *See, e.g.*, Pet. App. A-88 to

A-89 (comparing existing and historical fishery conditions on the Presumpscot River).

Nor was Congress oblivious to the fact that dams could affect rivers in ways that do not involve discharges into the river from a point source. Notwithstanding the 1972 legislative refocusing of the Clean Water Act on controlling point source pollution,[5] Congress was not silent on the matter of non-point source effects on water quality. In section 304(f)(2)(F) of the Clean Water Act, Congress required the EPA to consult with state and federal agencies and to issue "information including (1) guidelines for identifying and evaluating the nature and extent of non-point sources of pollution, and (2) processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F).

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[5] The Water Pollution Control Act Amendments of 1972 reshaped federal water law and created the basic framework of the Clean Water Act that exists today. Replacing both the general structure and approach of the prior law, these amendments "replac[ed] water quality standards with point source effluent limitation." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). This change in focus emerged from the finding that as of 1971 "the Federal water pollution control program . . . has been inadequate in every respect." S. REP. NO. 92-414 (1971), at 7, *reprinted in* COMM. ON PUBLIC WORKS, 93D CONG., 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1699 (1973); *see also id.* at 69, *reprinted in* 2 LEG. HIST., at 1487 (noting that the Senate Bill that evolved into the 1972 amendments, S. 2770, changed the law's "emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants").

Both the D.C. Circuit and Sixth Circuit have found that section 304(f)(2)(F) is evidence that Congress intended to regulate water quality changes associated with dams through the implementation of non-point source controls. *Gorsuch*, 693 F.2d at 177; *Consumers Power*, 862 F.2d at 588. For present purposes, the simpler point is that section 304(f)(2)(F) shows that Congress did not attempt to use the term "discharge" in describing what it is that dams can do to water quality. Instead, Congress employed very different words and concepts ("changes in movement") when describing the effects of dams. Given this background, to equate a mere change in a river's movement with a "discharge into" the same river is simply too much.

V. Consideration Of Clean Water Act Section 511(c)(2) And The Legislative History Of Sections 401 And 402 Would Support Even A Narrower Reading Of Section 401 Than Is Necessary To Rule In Warren's Favor.

The foregoing examination of how the word "discharge" is used in the Clean Water Act, together with the reasoning adopted by this Court in *Miccosukee* and by the EPA in its official pronouncement, all lead to the conclusions that section 401 is inapplicable when nothing is added to the water from a point source, and that the mere flow of a river through a dam is not an addition of anything to the river. Those conclusions based on the language of the statute should be sufficient to warrant reversal of the SJC's decision. Simply put, to the extent that there is any ambiguity in the plain language of the

Clean Water Act that might otherwise be clarified by widening the scope of inquiry, there is no ambiguity on the basic points at issue here: There must be an addition of at least something to the river from a point source; and the river flowing through a dam is not the addition of anything.

That being said, Warren's position is fortified by considering how section 401 was understood by Congress in writing other sections of the Clean Water Act, and in the drafting of section 401 itself. While Warren need only establish that section 401 requires something more than the mere flow of a river through a dam in order for there to be a discharge into the river, Congress viewed section 401 even less broadly, and as requiring the addition of a pollutant from a point source in order for there to be a discharge into the river.

A. The Language Used In Section 511(c)(2) To Preclude Duplicative And Inconsistent NEPA Review Of Activities Certified Under Section 401 Would Be Facially Inadequate If Section 401 Were Applicable When No Discharge Of A Pollutant Is Involved.

Clean Water Act section 511(c)(2), 33 U.S.C. § 1371(c)(2), evinces that Congress presumed that all activities certified under section 401 would in fact involve the discharge of pollutants. Section 511(c)(2) provides:

> Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to – (a) authorize any federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant

> to this chapter or the adequacy of any certification under Section 1341 of this title; or (b) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

The purpose of section 511(c)(2) is to prevent duplicative, and potentially inconsistent, review under NEPA of activities that have already been permitted or certified under sections 401 and 402.[6] *House Consideration of the Report of the Conference Committee, October 4, 1972* ("*H.R. Consid. of Conf. Rpt.*") (statement of Congressman Jones), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 236 (1973) ("1 LEG. HIST.") (stating that "[s]ection 511(c)(2) is intended to obviate the need for other Federal agencies to duplicate the determinations of the States and EPA as to water quality considerations"); *see also Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in* 1 LEG. HIST., at 183 (noting that other Federal agencies "shall accept as dispositive the determinations of EPA and the States (under section 401 and its predecessor, section 21(b) of the [Federal Water Pollution Control Act] prior to the 1972 amendments)").

If section 401 is interpreted to be inapplicable when the federally licensed activity involves no discharge of a pollutant, then the language Congress used in section 511(c)(2) achieves the stated purpose: NEPA review of the

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[6] NEPA directs the federal government to integrate environmental values into their decision-making process by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. 42 U.S.C. §§ 4321 *et seq.*

adequacy of section 401 certifications is precluded. If, however, section 401 is interpreted to require certifications even of activities that will not result in a discharge of a pollutant, then section 511(c)(2) would fall peculiarly and inexplicably short of achieving its purpose. It would preclude duplicative and inconsistent NEPA review of certifications involving the discharge of pollutants, yet allow such duplicative and inconsistent review when something other than a pollutant, and presumably less harmful, is added to the water.

In sum, section 511(c)(2) offers an answer to the question of what must be added to a river in order for there to be a "discharge" under section 401. The answer is that, notwithstanding the use of the term "includes" in defining discharges, Congress presumed that discharges under section 401 would necessarily include the addition of pollutants. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (in construing statutes, courts should look to "the broader context of the statute as a whole"); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law") (internal quotation marks omitted). Whether or not this Court were ultimately so to conclude, the fact that there is substantial evidence to suggest that section 401 discharges are no more than discharges of a pollutant or pollutants renders it entirely unreasonable to go so far in the other direction as to find that the flowing of a river through a dam is, in and of itself, a discharge into the river under section 401.

B. The Legislative History Confirms That The Term "Discharge" As Used In Section 401 Cannot Be Read So Broadly As To Encompass The Flowing Of The Presumpscot River Into The Presumpscot River.

The legislative history of sections 401 and 402 suggests an explanation for why Congress used the word "includes" in defining "discharge" even though it otherwise appears that Congress conceived of all discharges as involving the discharge of pollutants. The original Senate Bill in 1972 setting forth what became sections 401 and 402 employed in section 401 the term "discharge" precisely as it appears in the statute as enacted:

> Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State. . . .

S. 2770, 92d Cong. § 2 (1972) (proposing section 401(a)(1)), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1679 (1973) ("2 LEG. HIST."). This language was the same language that had appeared in section 21(b) of the prior law. Federal Water Pollution Control Act, § 21(b)(1) (amended 1970), *reprinted in* HOUSE COMM. ON PUB. WORKS, LAWS OF THE UNITED STATES RELATING TO WATER POLLUTION CONTROL AND ENVIRONMENTAL QUALITY 47-48 (1970).

Section 402 in the Senate Bill, in turn, granted the EPA the ability to issue NPDES permits "for the discharge of any pollutant, or combination of pollutants, into the navigable waters. . . ." S. 2770, 92d Cong. § 2 (proposing

section 402), *reprinted in* 2 LEG. HIST., at 1685. Thus, the Senate Bill contained the same use of different language in sections 401 and 402 that is in the statute as enacted and from which the reader infers different meanings.

At the same time, though, the Senate Bill made clear that no difference in meaning was intended. The Bill did this by defining "discharge" as follows:

> The term 'discharge' means (1) any addition of any pollutant to navigable waters from any point source, (2) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft, or (3) any addition of any pollution to publicly owned treatment works (as defined in section 210 of this Act) by any industrial user (as defined in section 210 of this Act).

Id. (proposing section 502(n)), *reprinted in* 2 LEG. HIST., at 1699.

In short, notwithstanding the use of "discharge" in section 401 and "discharge of pollutants" in section 402, the Senate Bill made clear that the former simply encompasses two forms of the latter (plus the discharge of pollution into publicly owned treatment works).

Several months later, the House responded with an alternative. A principal thrust of the competing House Bill was to provide a different permitting scheme for a form of heat pollutant that the House Bill defined as "thermal discharge." Specifically, the House Bill created a definition of "thermal discharge." H.R. 11896, 92d Cong. § 2(1972) (proposing section 502(17)), *reprinted in* 1 LEG. HIST., at 1043-45. Through this special treatment of the permitting

of thermal discharges, the House intended to allow for less stringent regulation of such discharges. *See id.* (proposing section 316, which provided for development of regulations specific to thermal discharges), *reprinted in* 1 LEG. HIST., at 1043-49; *H.R. Consid. of Conf. Rpt.* (statement of Congressman Clark noting that section 316 in the House Bill "recognizes that heat is less harmful than most 'pollutants' and that consideration should be given to the dissipative capacities of the receiving waters"), *reprinted in* 1 LEG. HIST., at 273.

While creating a different permitting approach for thermal discharges than the discharge of other pollutants under section 402, the House did not seek to exclude thermal discharges from the certification requirements of section 401. To achieve this result, the House Bill proposed the following two part approach to defining discharges and discharges of pollutants:

> The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
>
> . . . .

> The term 'discharge' when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge.

H.R. 11896, § 2 (proposing sections 502(13), 502(18)), *reprinted in* 1 LEG. HIST., at 1069-71.[7]

Fairly read, the competing House Bill proposed to narrow the reach of section 402 in the Senate Bill by eliminating reference to publicly owned treatment works and by softening section 402 permitting requirements for thermal discharges. The House's proposed definition of "discharge" simply made clear that "thermal discharges" were not to be excluded from section 401. There is certainly no evidence that the House Bill sought to broaden the ambit of the Senate Bill so that it addressed activities not addressed in the Senate draft, other than activities resulting in thermal discharges.

The final language that emerged from conference eliminated reference to publicly owned treatment works, retained the House's definition of "discharge of a pollutant," but modified its definition of "discharge" to eliminate reference to "thermal discharges," reflected as follows:

> The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants~~, and a thermal discharge~~.

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(16), 86 Stat. 816, 887 (1972)

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[7] In both S. 2770 and H.R. 11896 the term "pollutant" was defined as "not limited to" dredged spoil, solid waste, heat, etc. S. 2770, § 2 (proposing section 502(f)), *reprinted in* 2 LEG. HIST., at 1697; H.R. 11896, § 2 (proposing section 502(6)), *reprinted in* 1 LEG. HIST., at 1068.

(codified as 33 U.S.C. 1362(16) (stricken language reflects language deleted from House Bill).

In light of this drafting history, it would be reasonable to conclude that the present definition of "discharge" is not intended to imply any materially greater scope for section 401 than for section 402. The definition was initially drafted simply to reflect that the House proposed separate treatment for thermal discharges than for discharges of pollutants under the section 402 permitting scheme. Hence it created a definition of "discharge" that would preserve that proposed distinction. When that distinction was dropped, the conferees simply struck "thermal discharge" from the definition. To argue now that these partially successful efforts by the House to narrow the scope of section 402 in the Senate Bill somehow were intended to substantially *widen* the scope of section 401 finds no support in this history. The pertinent language of section 401 itself as contained in both Bills never changed, and no one suggested that either the House or the Senate envisioned any broader regulatory mandate than that federal agencies may not license discharges of pollutants into the navigable waters without state certification.

For present purposes, though, the point is not that section 401 should be limited to discharges of pollutants in order to comport with this drafting history. Rather, the simpler point is that, however one parses this history, one certainly finds no support for reading the term "discharge into" so broadly as to include an activity that adds nothing at all to the waters.

CONCLUSION

The Clean Water Act unambiguously requires, at the very least, that something be added into the navigable waters from a point source before one can begin to say that there is any discharge into the waters under section 401. The language of the statute does not specify with equal clarity what it is that needs to be added to the waters in order to have a discharge into the waters. Canons of statutory interpretation counsel that the substance added must be something like a pollutant, although the use of the word "includes" in the definition of "discharge" implies that what must be added need not actually be a pollutant. But the legislative history and the language of section 511(c)(2) suggest the contrary, indicating that Congress actually presumed that it would be a pollutant.

What is nevertheless clear, though, is that the mere flow of the river itself through the dam does not constitute a discharge into the river of anything at all. For this simple reason alone, the decision of the SJC should be reversed.

Respectfully submitted,

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APPENDIX:
STATUTORY PROVISIONS INVOLVED

Clean Water Act

33 U.S.C. § 1314. Information and guidelines

. . . .

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including

(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and

(2) processes, procedures, and methods to control pollution resulting from –

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

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33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b)

and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of

such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the

applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of

assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or

permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

(A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

(B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of

such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)

(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by

each such source, in addition to adequate notice to the permitting agency of

(A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

(B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

(C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this

section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. – A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

> (A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue

(A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or

(B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of

this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a

vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of

(1) section 1311, 1316, or 1342 of this title, or

(2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor

shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's

authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and

identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations

established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if –

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which

is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges

for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum,

(A) establish priorities,

(B) establish requirements for State stormwater management programs, and

(C) establish expeditious deadlines. The program may include performance standards,

guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

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33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

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(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

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33 U.S.C. § 1371. Authority under other laws and regulations

. . . .

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

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